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In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

No. 559

CHOCTAWHATCHEE ELECTRICAL CO-OPERATIVES, INC., a corporation,
Petitioner,
v.
RAY E. GREEN, as Comptroller of the State of Florida,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA AND APPENDIX

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In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

CHOCTAWHATCHEE ELECTRICAL CO-OPERATIVES, INC., a corporation,
Petitioner,

v.

RAY E. GREEN, as Comptroller of the State of Florida,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

Petitioner, Choctawhatchee Electrical Cooperatives, Inc., a corporation, prays that a writ of certiorari issue to review the decision of the Supreme Court of the State of Florida in this case.

OPINIONS BELOW

The opinion of the Supreme Court of the State of Florida is reported at 132 So. (2d) 556, and in App. B, p. 2 a, *infra*. The decision of the First District Court of Appeals

of Florida, is set out, *infra*, in App. D, p. 10 a, and the final decree of Circuit Court of the Second Judicial Circuit, in and for Leon County, Florida, is set out in App. E, p. 14 a.

JURISDICTION

The opinion of the Supreme Court of Florida was filed on July 26, 1961, and a timely petition for rehearing was denied by an order of the Supreme Court of Florida dated September 20, 1961. Jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1257(c), since the opinion of the Supreme Court of Florida upheld a tax imposed by state law on the property of the United States of America notwithstanding Article VI of the Constitution of the United States, which renders such property immune from state and local taxation.

QUESTION PRESENTED

Whether the State of Florida may levy and collect a documentary stamp tax on a promissory note which is the property of the United States of America.

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

Article VI., Clause 2, of the Constitution of the United States, provides:

> "The Constitution, and the Laws of the United States, which shall be made in pursuance thereof; and all treaties made, or which shall be made, under authority of the United States, shall be the supreme Law of the

Land: and the judges in every state shall be bound thereby, any thing in the Constitution or Laws of any state to the contrary notwithstanding."

Section 201.01 Florida Statutes (1959) provides:

"201.01 *Documents taxable, generally.*—There shall be levied, collected and paid the taxes specified in this chapter, for and in respect to the several documents, bonds, debentures or certificates of stock and indebtedness, and other documents, instruments, matters, writings, and things described in the following sections, or for or in respect of the vellum, parchment, or paper upon which such document, instrument, matter, writing, or thing, or any of them, are written or printed by any person, who makes, signs, executes, issues, sells, removes, consigns, assigns, or ships the same, or for whose benefit or use the same are made, signed, executed, issued, sold, removed, consigned, assigned, or shipped in the State of Florida."

Section 201.08 Florida Statutes (1959) provides:

"201.08 *Tax on promissory notes, written obligations to pay money, assignments of wages, etc.*—On promissory notes, non-negotiable notes, written obligations to pay money, assignment of salaries, wages or other compensation, made, executed, delivered, sold, transferred, or assigned in the State of Florida, and for each renewal of the same on each one hundred dollars

of the indebtedness or obligation evidenced thereby, the tax shall be ten cents. Mortgages which incorporate the certificate of indebtedness, not otherwise shown in separate instruments, are subject to the same tax at the same rate."

STATEMENT

Between the years 1941 and 1957, petitioner, Choctawhatchee Electric Co-operative, Inc., borrowed $3,002,000.00 from the United States, and executed promissory notes in favor of the United States to evidence such indebtedness. During this period no documentary tax stamps were attached to these promissory notes. It was alleged in petitioner's complaint, (R. 4) and admitted in respondent's answer (R. 8), that the promissory notes are and at all times have been the property of the United States.

No attempt was made to collect this tax until the Attorney General of the State of Florida, in an opinion dated October 3, 1958, advised the Florida Comptroller General that the documentary stamp tax was applicable to a note, even though it was the property of the United States (App. F., p. 20 a, *infra*). By letter dated August 20, 1959, Ray E. Green, as Comptroller General of Florida and respondent herein, made demand upon petitioner for payment of the documentary stamp taxes on obligations heretofore incurred by petitioner to the United States in the amount of over 3 million dollars.

Petitioner filed a class suit in equity, seeking to enjoin the collection of this tax on September 4, 1959, in the Circuit Court of Leon County, and the court, in denying the injunction, held the documentary stamp tax on the notes to be valid and collectible (App. E, p. 14 a, *infra*). The

decree was affirmed by the First District Court of Appeals of Florida (App. D., p. 10a, *infra*).

On July 26, 1961, the Supreme Court of Florida affirmed the decisions of the lower courts (App. B, p. 2a, *infra*), rejecting the petitioner's contention that the tax was forbidden by the Constitution of the United States. On September 20, 1961, a petition for rehearing was denied. (App. A, p. 1a, *infra*).

The question of right of the State of Florida to impose the documentary stamp tax under the Constitution of the United States was first raised in paragraph five of the complaint (R. 4). Petitioner has consistently maintained that the promissory notes executed in favor of the United States were constitutionally[1] immune from the state tax at each stage of the litigation of this matter including the petition for rehearing before the Florida Supreme Court (R. 54) where this federal question was the sole reason advanced.

REASONS FOR GRANTING THE WRIT

1. The decision of the Supreme Court of Florida is in conflict with the relevant decisions of this Court interpreting Article VI of the Constitution of the United States.

The state court in its opinion stated (p. 6a, *infra*).

"In answer to petitioner's contention that the federal

[1] Petitioner, in addition to advancing the argument that the subject tax was contrary to the Constitution of the United States, took the position that the tax also violated Section 192.06(1) Florida Statutes, which exempts certain property of the United States from taxation. Much of the state court's decision is involved with the construction of this statute, which is not at issue here.

> constitution and decisions preclude the imposition of the tax in this case, it is sufficient to say that nowhere has petitioner demonstrated any such prohibition."

Following its own decision in *Plymouth Citrus Growers' Association v. Lee*, 27 So. 2d 415 (1946), the state court quotes approvingly from the earlier opinion:

> "It is hardly necessary to say that so long as the federal law does not forbid such a tax the state may exercise the privilege to impose it."

The *Plymouth* case, however, involved the obligations of the Association to an instrumentality of the United States. Whatever validity this position may have regarding the property of an instrumentality of the United States, it clearly has no application to the property of the United States *qua* sovereign. Absent the consent of Congress, the property of the Federal Government is constitutionally immune from state and local taxation.

As early as 1819 Justice Marshall, in *McCulloch v. Maryland*, 4 Wheat. 316 (1819), asserted,

> ". . . the states have no power by taxation or otherwise, to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government . . . ."

and several years later Marshall defined the even more fundamental meaning of the Supremacy Clause, in *Gibbons v. Ogden*, 9 Wheat. 1, 210 (1824),

"... the nullity of an act, inconsistent with the Constitution, is produced by the declaration, that the Constitution is the supreme law ..."

The vitality of that doctrine today is clear from the decision of this Court in *U.S. v. Allegheny County*, 322 U.S. 174 (1944).

"But unshaken, rarely questioned, and indeed not questioned in this case, is the principle that possessions, institutions and activities of the Federal Government itself in the absence of express Congressional consent are not subject to any form of state taxation."

The Supreme Court of Florida would extend the theory of implied consent to taxation of Federal instrumentalities to property of the United States Government itself. Petitioner respectfully urges that such a withdrawal from the principles set down in *Gibbons v. Ogden*, and *U. S. v. County of Allegheny, supra*, is utterly inconsistent with the Supremacy Clause of the Constitution of the United States.

The state court in its opinion in this case interpreted the documentary stamp tax as a tax on the document itself. (App. B, p. 5 a), and the statute makes no distinction between the maker of the note and the payee as to who shall be responsible for its payment. The Florida authorities, of course, have looked only to the maker of the notes (i.e., petitioner) for payment and will not attempt to collect the tax from the United States directly. (See: Opinion of Attorney General of Florida, App. F., *infra.*)

This Court said in *Pittman v. Home Owners' Loan*

Corp., 308 U.S. 21 (1939), that it is immaterial which party to the loan paid the tax, quoting with approval from *Federal Land Bank v. Crosland*, 261 U.S. 374 (1923), at 308 U.S. 31,

> "whoever pays it, it is a tax upon the mortgage and that is what is forbidden by the law."

This Court reiterated this position in *Laurens Federal Savings and Loan* v. *South Carolina Tax Commission*,[2] 365 U.S. 517, saying,

> "the fact that the state taxing statute did not require payment of the tax by the lender has 'no determining' significance."

2. The question presented is of substantial and continuing importance. The immediate case involves only the taxes supposedly due on promissory notes executed by petitioner. However, there are some fifteen other electrical cooperatives similarly situated in the State of Florida and the action was originally brought by petitioner as a class action (see complaint R. 2).

Since the inception of the rural electrification program, the Federal Government has loaned more than 76 million

[2] The Solicitor General of the United States in his *Memorandum for the United States as Amicus Curiae*, requesting this Court to grant certiorari in the *Laurens* case, anticipated possible difficulty with the very Florida statute involved here, saying (p. 3),

> "2. The question presented is of substantial and continuing importance. At least two other states have taxing statutes similar to South Carolina's. (See 72 Pa. Stat. Am. (Purdon 1949) Sections 203(p), 3250-10; *Fla. Stat. (1959), Section 201.08*, and the decision may prompt other states to adopt like legislation." (Italics supplied)

dollars to borrowers in Florida. Since the tax rate imposed is ten cents on each $100, more than $70,000,000 is directly involved in this case.

Moreover, there are numerous classes of loans made by the United States in which the borrower makes a note payable to the United States, such as direct Veterans loans under Public Law 550. The language of Section 201 of the Florida Statutes is broad enough to include a levy on any promissory note or written obligation to pay executed in favor of the United States.

3. The ruling of the Florida Supreme Court frustrates basic Congressional policy as set forth in legislation creating the Rural Electrification Administration, 7 U.S.C. Section 901 *et seq.*

The intent of Congress is stated in Section 902,

> ". . . to make loans . . . for rural electrification and for the furnishing of electric energy to persons in rural areas who are not receiving central station service and for the purpose of furnishing and improving telephone service in rural areas."

If the state tax in question is permitted to stand, it will result in the State of Florida placing a burden on the entire Rural Electrification program within the state thus interfering with the Sovereign in carrying out the express intent of Congress. Moreover, the United States will have been placed in the position of a creditor second in order of preference *after* the claim of the state for its taxes has been satisfied.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

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APPENDIX A

IN THE SUPREME COURT OF FLORIDA
JULY TERM A.D. 1961
WEDNESDAY, SEPTEMBER 20, A.D. 1961

Case No. 40,077

CHOCTAWHATCHEE ELECTRIC
COOPERATIVE, INC.,
Petitioner,

-vs-

RAY E. GREEN, as Comptroller of the State of Florida,
Respondent

On consideration of the Petition for Rehearing filed by Attorneys for Petitioner-Appellant,

IT IS ORDERED by the Court that the said petition be and the same is hereby, denied.

[A TRUE COPY, SEAL, ETC., OMITTED]

APPENDIX B.

IN THE SUPREME COURT OF FLORIDA
JULY TERM, A.D. 1961

Case No. 40,077

CHOCTAWHATCHEE ELECTRIC COOPERATIVE, INC.,
Appellant-Petitioner,

-vs-

RAY E. GREEN, as Comptroller of the State of Florida,
Appellee-Respondent.

Opinion filed July 26, 1961.

Writ of Certiorari and Appeal from the District Court of Appeal, First District.

Roscoe Pickett and Alex Akerman, Jr., of Pickett, Akerman & Shipley (Atlanta, Georgia); W. J. Oven, Jr., of Caldwell, Parker, Foster, Madigan & Oven, for Appellant-Petitioner.

Richard W. Ervin, Attorney General, Joseph C. Jacobs and Sam Spector, Assistant Attorneys General, for Appellee-Respondent.

PER CURIAM:

At various times beginning in 1941 and ending in 1957, Choctawhatchee Electric Cooperative, Inc., borrowed $3,002,000 from the United States and executed promissory notes in favor of the United States to evidence such in-

debtedness. The said promissory notes were secured by real property mortgages on Choctawhatchee Electric Cooperative's Florida holdings, and supplemental agreements relating thereto. The United States, as mortgagee, placed the said mortgages and supplemental agreements of record in Walton County, Florida. No documentary stamps were attached to said promissory notes, real property mortgages, and supplemental agreements. Choctawhatchee Electric Cooperative concedes that the notes, mortgages, and supplemental agreements were each and every one issued and executed by it in the State of Florida, and delivered to the United States by mail.

By letter dated August 20, 1959, Ray E. Green, Comptroller of the State of Florida, made demand on Choctawhatchee Electric Cooperative, Inc., for payment of the documentary stamp tax in the amount of $3,082 which he alleged was due the state on said promissory notes under §201.08, Florida Statutes.

September 4, 1959, Choctawhatchee Electric Cooperative, Inc., filed suit in equity in the Circuit Court of Leon County, seeking an adjudication of its rights relative to the imposition of the documentary stamp tax as charged by the comptroller and prayed for both temporary and permanent injunction restraining the comptroller from imposing, collecting or attempting to collect any such documentary stamp tax on said promissory notes. The essential defense of Choctawhatchee Electric Cooperative, Inc., to the payment of said documentary stamp tax is that no such tax is or can be imposed by the State of Florida on said promissory notes when issued to the United States because said documentary stamp tax is imposed on the documents and the documents involved in this case, being the property of the United States, are exempt from all forms of taxation

under §192.06, Florida Statutes, and by virtue of that provision of the federal constitution immunizing property of the United States from state taxation.

At the hearing on the prayer for injunctive relief the chancellor denied the injunction and held the documentary stamp tax on the promissory notes to be valid and collectible. On appeal to the District Court of Appeal, First District, the decree of the chancellor was affirmed.

We are confronted with a petition for review by certiorari from the order of the District Court of Appeal, First District.

Petitioner contends that the decision of the district court of appeal conflicts on the same point of law with the decision of this court in *North American Company* vs. *Green, Fla.* 1960, 120 So.2d 603; that said decision affects a class of constitutional and state officers; and finally, that said decision construed a controlling provision of the federal constitution. We granted writ of certiorari and consented to hear oral arguments because of the apparent conflict between the decision of the district court of appeal and our decision in *North American Company* vs. *Green*, supra.

The essential question presented for determination is whether or not the State of Florida has power to impose the documentary stamp tax on promissory notes issued to the United States of America by a Florida corporation.

Section 201.08, Florida Statutes, provides for the payment of a documentary stamp tax on "promissory notes, non-negotiable notes, written obligations to pay money, assignments of salaries, wages, or other compensation,

made, executed, delivered, sold, transferred, or assigned in the state, and for each renewal of the same on each one hundred dollars of the indebtedness or obligation evidenced thereby, the tax shall be ten cents. Mortgages which incorporate the certificate of indebtedness, not otherwise shown in separate instruments, are subject to the same tax at the same rate." We think the district court of appeal was in error in holding that the documentary stamp tax involved in this case was more in the nature of a transaction tax. The weight of authority in this state appears to be to the contrary. The federal decisions are likewise to the contrary.

The Florida documentary stamp tax act, Chapter 201, Florida Statutes, was taken largely from Sections 800 et seq., of the federal revenue act of 1924, as amended in 1926 and 1928. Consequently, the decisions of this court have followed the federal decisions with respect to the imposition of the documentary stamp tax. The federal decisions have consistently held that the documentary stamp tax is imposed on the document; that both liability for the tax as well as the amount of the tax must be determined by reference to the document only; that proof of extrinsic facts to establish liability for the tax on its amount will not be countenanced. *United States* vs. *Isham*, 17 Wall. 496, 84 U. S. 496, 21 L.Ed. 728; *Lee* vs. *Kenan*, 5th Cir., 78 F.2d 425; *Endler* vs. *United States*, D.C., N.J., 110 F. Supp. 945.

The contention of the petitioner that no documentary stamp tax can be imposed on the promissory notes in this case because §192.06, Florida Statutes, precludes the imposition of such a tax on property belonging to the United States, is untenable. The tax here involved is not a property tax. It is an excise tax. There is no attempt here

to impose a tax on the United States. In *Plymouth Citrus Growers Assn.* vs. *Lee*, Fla. 1946, 27 So.2d 415, we were confronted with a situation very similar to that we have in this case. In the latter case a citizen of this state sought to avoid the imposition of the documentary stamp tax, claiming as petitioner does here, that the tax in realty was a tax on property of the United States. We held that the tax was on the citizen's "promise to pay" which was contained within the promissory note issued to the United States. In answer to petitioner's contention that the federal constitution and decisions preclude the imposition of the tax in this case, it is sufficient to say that nowhere has the petitioner demonstrated any such prohibition. As this court held in the *Plymouth Citrus Growers Assn. case*, "It is hardly necessary to say that, so long as the federal law does not forbid such a tax the state may exercise the privilege to impose it." The reasoning of the Supreme Court of the United States in *Wilson* vs. *Cook*, 327 U.S. 474, 66 S.Ct. 663, 90 L.Ed. 793, we think concludes the point contrary to the contention of the petitioner. Section 201.08, Florida Statutes, imposes the tax on promissory notes under conditions present here: the liability for payment of the tax devolves upon the petitioner because of its "promise to pay," *Metropolis Publishing Company* vs. *Lee*, supra.

Upon re-examination of our decision in the *North American Company case*, supra, it is apparent that it does not conflict on the same point of law with the decision of the district court of appeal in this case. In the *North American Company case* we were confronted with a different theory for imposing the documentary tax from that which we are confronted in this case. The imposition of the tax in *North American Company* vs. *Green*, supra,

was predicated upon §201.04, Florida Statutes, having to do with the transfer of stock certificates (the tax being imposed on the transfer) whereas in the case at bar the tax is predicated upon §201.08, Florida Statutes, having to do with the issuance of promissory notes (the tax being imposed on the document containing the promise to pay). Even if it could be said (which we do not now decide) that the decision of the district court of appeal herein affects a class of constitutional officers, giving rise to our jurisdiction under Art. V, Sec. 4(2), Florida Constitution, it is axiomatic that certiorari should not be granted on this basis where, as here, we concur in the decision of the district court but disagree as to the reasons given therefor because of the well settled rule that the judgment of an inferior tribunal will not be reversed on appeal because of erroneous reasons applied in reaching a correct decision.

Certiorari is accordingly denied.

ROBERTS, C. J., TERRELL, THOMAS, HOBSON and O'CONNELL, JJ., concur DREW and THORNAL, JJ., agree to conclusion.

THORNAL, J., Concurring in the conclusion specially.

I have concurred because I agree that the tax is collectible but I cannot come to agree with the argument that the nature of the tax is merely an assessment against a document or a piece of paper. It may be that we are confusing the issue with mere semantics. However, this point appears to be a substantial part of petitioner's argument. Section 201.01 provides that the tax shall be levied, collected and paid "for and in respect to the several documents" "by any person who makes, signs, executes, etc. the same." The tax levied by Section 201.08 on promis-

sory notes, etc., is measured by the amount of the indebtedness evidenced by the instrument. To that extent it might be described as a tax on the document. However, my authority for the view that the tax is by nature an excise tax levied as an impost for the privilege of performing an act within the taxing forum, is the view of Chief Justice Hughes in *Graniteville Mfg. Co.* v. *Query*, 283 U.S. 376, 51 S.Ct. 515. The tax there involved was the federal documentary stamp tax on promissory notes. In his opinion Chief Justice Hughes stated, "The tax as thus sustained is an excise tax, of a familiar sort, levied with respect to the creation of instruments within the state." He concluded with this description, to wit: "It is simply a tax levied in relation to an act done within the state in making an instrument."

The *Graniteville case* is probably the most often cited decision on this proposition. We followed it in *State* v. *Gay*, 90 So.2d 132. When viewed in this light it seems to me to be immaterial whether the United States or someone else owns the paper upon which the petitioner executed the agreement to pay. While the paper which may be owned by the United States evidences the act of the petitioner, the fact remains that the excise tax is collected by the state from the one who "makes" the instrument and is measured by the amount of the promise to pay.

I agree that the tax is collectible but not entirely for the reasons stated in the opinion. I, therefore, agree to the conclusion and judgment.

DREW, J., concurs.

APPENDIX C

(Order of First District Court of Appeal)

FORMAL CAPTION OMITTED

ORDER

Appellant's petition for a rehearing having been considered.

IT IS ORDERED that the petition be denied.

WITNESS the Honorable John T. Wigginton, Chief Judge, and Seal of the Court this 21st day of October, A. D. 1960.

/s/ Clinton Ashmore
Clerk

A True Copy
ATTEST:

(SEAL)
/s/ Clinton Ashmore
Clerk First District Court of Appeal
Tallahassee, Florida

APPENDIX D

(Opinion of Intermediate Appellate Court)

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA
JULY TERM, A.D., 1960

Case No. C-57

CHOCTAWHATCHEE ELECTRIC
COOPERATIVE, INC.,
Appellant,
-vs-
RAY E. GREEN, as Comptroller of the State of Florida,
Appellee.

Opinion filed September 22, 1960.

An Appeal from the Circuit Court of Leon County, HUGH M. TAYLOR, Judge.

Pickett, Akerman & Shipley, for Appellant.

Richard W. Ervin, Attorney General, and Joseph C. Jacobs and Sam Spector, Assistants Attorney General, for Appellee.

WIGGINTON, Chief Judge:

The sole question presented by this appeal is whether appellant, a private Florida corporation, is liable for pay-

ment of a documentary stamp tax on promissory notes executed by it in this state, which were thereafter delivered to and held by the United States of America as evidence of a loan. The notes are secured by a duly executed mortgage in favor of the United States and recorded in the public records of Walton County. From an adverse decree the protesting taxpayer has appealed.

Appellant premises its right to reversal upon the theory that the tax in question is one levied exclusively upon the documents evidencing the loan, and that under the statute these documents as property of the United States are therefore exempt from all forms of taxation.[1]

In support of its position appellant points to the title of the act pursuant to which the tax in question is imposed which recites that it is "An Act Levying and Imposing an Excise Tax on Documents to Raise Revenue for the Support of the State Government and Prescribing Penalties for Failure to Pay Said Tax." The first section of the act levies the tax,[2] and the eighth section thereof

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[1] "The following property shall be exempt from taxation:
(1) All property, real and personal of the United States and of this state except such property of the United States as shall be subject to taxation by this state or any political subdivision or municipality thereof under any law of the United States." Sec. 192.06, F.S.

[2] "Documents taxable, generally—*There shall be levied*, collected and paid *the taxes specified in this chapter, for and in respect to the several documents*, bonds, debentures or certificates of stock and indebtedness, and other documents, instruments, matters, writings, and things *described in the following sections*, or for or in respect of the vellum, parchment, or paper upon which such document, instrument, matter, writing, or thing, or any of them, are written or printed by any *person who makes*, signs, executes, issues, sells, removes, consigns, assigns, or ships the same, or for whose benefit or use *the same* are made, signed, executed, issued, sold, removed, consigned, assigned, or shipped in the state." Sec. 201.01, F.S.

makes it specifically applicable to promissory notes and fixes the rates to be collected.[3] Taken literally, the plain language adopted by the legislature lends support to appellant's position that the tax is assessed and levied upon the documents described in the act, and not upon the transaction of which the documents are but an integral part.

By his decree the chancellor found that the intent of the statute is to levy an excise tax against the maker of promissory notes for the privilege of engaging in a transaction pursuant to which the notes are made, executed and delivered. Confined to its essential parts applicable only to the transaction now under consideration, the chancellor interpreted the statute to mean that "There shall be paid the taxes specified in this chapter for and in respect to the several documents described in the following sections, by any person who makes the same." (See emphasized portion under Footnote 2) Having concluded that the tax is imposed upon the maker of the notes, the chancellor held that the tax was one levied upon the transaction between the appellant and the United States, and not upon the documents consisting of the promissory notes in question. With this conclusion we are impelled to agree.

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[3] "Tax on promissory notes, written obligations to pay money, assignments of wages, etc.—

(1) On promissory notes, non-negotiable notes, written obligations to pay money, assignment of salaries, wages, or other compensation, made, executed, delivered, sold, transferred, or assigned in the state, and for each renewal of the same on each one hundred dollars of the indebtedness or obligation evidenced thereby, the tax shall be ten cents. Mortgages which incorporate the certificate of indebtedness, not otherwise shown in separate instruments, are subject to the same tax at the same rate." Sec. 201.08. F.S.

In the *Plymouth Citrus Growers Association* case[4] our Supreme Court considered the applicability of the documentary stamp tax to a promissory note given by a Florida citizen to the Columbia Bank for Cooperatives of Columbia, South Carolina, an instrumentality of the United States. It was there held that the documentary stamp tax is an excise tax on the promise to pay, and the terms and certainty of payment are not material. In Peninsular Telephone Company it was held that the documentary stamp tax is more nearly of the nature of a transaction tax that is imposed upon particularly described transactions when they occur within the limits of this state. It was there held that it was the execution and exchange of documents for money that created the documentary liability.[5] In a more recent decision our Supreme Court has made it eminently clear that the documentary stamp tax is an excise levied upon transactions of which the documents described in the act are merely a part, and not a tax upon the documents themselves.[6] Similar constructions have been placed upon comparable acts by courts in the federal jurisdiction.[7] We hold that the document is merely evidence of the transaction to which is attached the stamp showing payment of the tax imposed.

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[4] PLYMOUTH CITRUS GROWERS ASS'N v. LEE, 157 Fla. 893, 27 So.2d 415.

[5] STATE ex rel PENINSULAR TELEPHONE CO. v. GAY, (Fla. 1956) 90 So.2d 132.

[6] NORTH AMERICAN COMPANY v. GREEN, (Fla. 1960) 120 So.2d 603.

[7] GRAXITEVILLE MFG. CO. v. QUERY, 283 U.S. 376, 51 S.Ct. 515, 75 L.Ed. 1126. See also EXDLER v. U. S. (D.C.N.J.) 110 F. Supp. 945.

The decree appealed, which found that appellant is liable for payment of the documentary stamp tax on the promissory notes executed by it and payable to the United States, is accordingly affirmed.

STURGIS and CARROLL, DONALD, JJ., CONCUR

APPENDIX E

(Opinion and Decree of Circuit Court of Leon County)

(CAPTION OMITTED)

FINAL DECREE

By appropriate pleadings the Court is called upon to determine whether or not a private corporation organized under the laws of Florida is required by law to pay the stamp tax imposed by Chapter 201, Florida Statutes, with respect to notes executed by such corporation in favor of the United States of American [sic] and evidencing debts owing by the corporation to the Federal Government.

It is first contended that this tax should not be required for the reason that the notes are property of the United States and as such are exempt from taxation in Florida by the operation of Section 192.06, Florida Statutes, the pertinent part of which is as follows:

> "The following properties shall be exempt from taxation: (1)—All property, real and personal, of the United States and of this State, except such property of the United States as shall be subject to taxation by this State, or any political subdivision or municipality thereof under any laws of the United States."

This argument cannot prevail. In the case of *Miami Beach College Corporation* v. *Tomlinson*, 196 So. 608, the Supreme Court of Florida held that Section 897, Compiled General Laws of 1927, (substantially the same as the present Section 192.06, Florida Statutes, insofar as pertinent here) referred to advalorem taxes. In the case of *Orange State Oil Co.* v. *Amos*, 130 So. 707, the Supreme Court said of the same statute, "That is a general exemption from 'property' taxes which clearly does not exclude indirect excise taxes, which were not regarded as excluded under the general principles of law of which Section 897, Supra, is largely declaratory".

This is another and more compelling reason why the exemption of Section 192.06 does not apply. The exemption granted it to "property". The tax here involved is not a tax upon property. It is an excise tax. Insofar as this case is concerned it is a tax upon the maker of the notes. The statute is somewhat unusual in its phraseology. Section 201.01, Florida Statutes, provides that:

> "*There shall be* levied, collected and *paid the taxes specified in this chapter, for and in respect to the* several *documents*, bonds, debentures or certificates of stock and indebtedness, and other documents, instruments, matters, writings, and things *described in the following sections*, or for or in respect to the

vellum, parchment or paper upon which such document, instrument, matter, writing, or thing, or any of them are written or printed *by any person, who makes*, signs, executes, issues, sells, removes, consigns, or ships *the same*, or for whose benefit or use the same are made, signed, executed, issued, sold, removed, consigned, assigned, or shipped in the state." (Italics supplied)

The italic portions of the statute fairly indicates the legislative intent as to the application of the statute to the makers of promissory notes. Reading these words, with the unnecessary parts omitted, we find the statute is very plain: "There shall be paid the taxes specified in this chapter for and in respect to the several documents described in the following sections by any person who makes the same." A note in the hands of the maker before delivery is not property as a note. Of course, the maker may have legal title to the paper upon which a note is written and the ink upon the paper, but the instrument does not become a legal note until it is delivered. Certainly the statute does not tax a note signed but never delivered. The note becomes taxable as property only in the hands of the payee, because it does not become property until the instant of delivery and at that instant title vests in the payee. Since the statute under consideration clearly requires payment of the tax by the maker of notes, it necessarily follows that the tax is not a property tax. Certainly the legislature did not intend to require one man to pay a property tax upon property of another. This would be clearly unconstitutional.

The Supreme Court seems to have experienced some difficulty in expressing the exact nature of the tax. In

a single decision[1] we find these expressions used: "We are of the view that it is more nearly of the nature of a transaction tax that is imposed upon the particularly described transactions when they occur within the limits of this state". "The very name by which our own statutes describe the tax bespeaks the nature of the impost—it is a tax on documents evidenced by a stamp to be placed thereon at the effective delivery thereof." "The nature of the type of tax involved was adequately described by Mr. Chief Justice Hughes in the United States Supreme Court decision in the *Graniteville Mfg. case* when he stated: 'The tax as thus sustained is an excise tax, of a familiar sort, levied with respect to the creation of instruments within the state * * * It is simply a tax levied in relation to an act done within the state in making an instrument'."

While these definitions are not entirely harmonious, there is inherent in each of them the idea that there is necessarily some *action* as the basis of the creation of the tax liability. Considering these definitions in the order in which they appear above, we observe:

(1) The first definition described the tax as a "transaction tax". This is clearly something different from a property tax. It obviously refers to the action of the parties in conducting a particular business operation.

(2) The second definition at first glance might be said to support the idea that the tax is a property tax because of the expression "it is a tax on documents". But this definition clearly indicates that the tax is not required

[1] *State v. Gay*, 90 So.2d 132

except as an incident of "the effective delivery" of the instrument.

(3) The third definition, drawn from the language of Mr. Justice Hughes—"It is simply a tax levied in relation to an act done—" —unmistakably indicates that the Court regarded the imposition as a tax upon the privilege of performing an act. While the act is related to property—the note—, and the stamps evidencing the tax must be affixed to property—the note—the tax is upon the act of making the note, including its delivery.

The language of the statute leaves no doubt that the tax is imposed both upon the maker and the payee. If one does not pay, the other must. Each is equally liable to the state for the amount of the tax. Of course in the present case the United States may not be taxed by the State of Florida, so the burden must fall exclusively upon the maker. But this does not relieve the maker from liability. From the language of the statute the maker is liable independent of any inability of the state to collect from the payee because of its immunity.

It is suggested that the immunity of the Federal Government from State taxation, which is inherent in its sovereignty, makes invalid the action of the State in levying a tax upon the note of a citizen made payable to the Federal Government. The tax in this case is not upon the Federal Government or its property. It is on the citizen, and Federal tax immunity does not forbid the tax.

If this question is not conclusively answered by the decision of the Supreme Court of Florida in the case of *Plymouth Citrus Growers Assn. v. Lee*, 27 So.2d 415, the reasoning of the Supreme Court of the United States in

Wilson v. *Cook*, 327 U. S. 474, 90 L.Ed. 793, 66 S.Ct. 663, leaves no doubt that the tax may be levied upon the maker of a note payable to the United States.

It is, therefore, CONSIDERED, ORDERED, AD JUDGED, DECREED and DECLARED that the Okeetawhatchee Electrical Cooperative, Inc., is liable for the payment of documentary stamp taxes* levied pursuant to Chapter 201, Florida Statutes, upon promissory notes executed by said corporation payable to the United States of America.

DONE and ORDERED at Tallahassee, Florida, this 29 day of January, 1960.

s/ Hugh M. Taylor
Hugh M. Taylor
Circuit Judge

*As corrected and amended by the *nunc pro tunc* order of Hugh M. Taylor, Circuit Judge dated February 5, 1960.

APPENDIX F

(Opinion of the Attorney General of Florida)
October 3, 1958

058-281

Honorable Ray E. Green
State Comptroller
Tallahassee, Florida

Attention: Mr. Lewis H. Tribble

Re: Documentary Stamp Taxes: notes and other obligations to the Rural Electrification Administration

Dear Mr. Green:

Replying to your recent request for an opinion of this office upon substantially the following questions:

1. Are promissory notes from a telephone company to the Rural Electrification Administration subject to the Florida documentary stamp taxing statutes?

2. Are promissory notes from an Electric Cooperative to the Rural Electrification Administration subject to the said documentary stamp taxing statutes?

For the purposes of this opinion we shall presume that the telephone company is one organized and established under chapter 608, Florida Statutes, or a like or similar statute of this or another state; and that the electric cooperative is one organized and established under chapter 425, Florida Statutes, or a like or similar statute of this or another state.

Corporations organized under either chapter 425 or 608, Florida Statutes, have full authority and power to borrow money and otherwise incur indebtednesses and evidence the same by their promissory notes, bonds, or otherwise, and to secure the payment of the same by mortgages, liens, pledges or otherwise encumbering their property or any part or parcel thereof. Each appears to be public service corporations or agencies. Each appears to be within the purview of the federal rural electrification statutes (title 7, sections 901, et seq., United States Code,) and qualified to obtain loans from the Rural Electrification Administration under the terms and conditions of said statute and the rules of the administration.

Although we find numerous provisions in the federal statutes relating to taxation and tax exemptions, we find nothing in the statutes relative to the Rural Electrification Administration, or rural electrification, expressly providing tax exemption for notes and mortgages or liens made payable to the said administration, in so far as the maker of such documents is concerned. Such documents in the hands of the federal government, or any of its agencies, are tax exempt in the absence of a federal statute authorizing or permitting their taxation in whole or in part. However, it does not follow that the maker of such documents is within the federal exemption. We find nothing in the federal statutes relative to rural electrification making the promissory note part and parcel of a mortgage securing it as does the Federal Land Bank statutes (see our opinion 050-504).

Chapter 201, Florida Statutes, appears to levy an excise tax upon promissory notes and other written obligations to pay money (section 201.08, Florida Statutes,) made, signed, executed, or issued in this state

(section 201.01, Florida Statutes). We find no state statute expressly exempting notes and other written obligations to pay money to the United States or any of its agencies from the operation of chapter 201, Florida Statutes, when made, executed, signed or issued in this state. Promissory notes issued by either a telephone company or an electric cooperative are not expressly exempt from documentary stamp taxes by either the federal or Florida statutes. We hold that such promissory notes are subject to documentary stamp taxes, within the rule of *Plymouth Citrus Growers Association* v. *Lee, Comptroller*, 157 Fla. 893, 27 So.2d 415, in the absence of some statute expressly exempting such documents from taxation, as against the makers thereof.

Although we hold in this opinion that promissory notes and other obligations to pay money made, signed, executed or issued in this state by telephone companies and electric cooperatives are subject to chapter 201, Florida Statutes, in so far as the maker is concerned, there is no obligation on the part of the Rural Electrification Administration or the federal government to pay in case the maker fails to pay. Collection may be made from the maker only. The federal agency is entitled to have the instruments recorded although the documentary stamp taxes may not have been paid prior to delivery to it. The State's remedy is against the maker, not the federal government.

Your file is returned herewith.

Sincerely,

RICHARD W. ERVIN
Attorney General

Prepared by:
FRED M. BURNS
Assistant Attorney General
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